



**OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN**

**GERALD C. MANN
ATTORNEY GENERAL**

Honorable Jack Wiech
County Attorney
Cameron County
Brownsville, Texas

Dear Sir:

Opinion No. O-4171
Re: Deferred judgments after
appeal to Court of Criminal
Appeals.

Your inquiry, stated herewith has been carefully considered by this office. Your question reads as follows:

"Where the defendant appeals to the Court of Criminal Appeals from a conviction in a misdemeanor case in which the punishment assessed was by fine only and the judgment of the trial court is affirmed, does the trial court have the authority to grant the defendant a deferred judgment after receipt of the mandate of the appellate court?"

Article 698 of the Code of Criminal Procedure, as amended by the Forty-second Legislature at its Regular Session in 1931 (General Laws, 42nd Leg., Ch. 39, P. 59), reads as follows:

"On each verdict of acquittal or conviction, the proper judgment shall be entered immediately. If acquitted the defendant shall be at once discharged from all further liability upon the charge for which he was tried; provided that, in misdemeanor cases where there is returned a verdict, or a plea of guilty is entered and the punishment assessed is by fine only, the Court may, on written request of the defendant and for good cause shown, defer judgment until some other day fixed by order of the Court; but

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in no event shall the judgment be deferred for a longer period of time than six (6) months. On expiration of the time fixed by the order of the Court, the Court or Judge thereof, shall enter judgment on the verdict or plea and the same shall be executed as provided by Chapter 4, Title 9, of the Code of Criminal Procedure of the State of Texas. Provided further, that the Court or Judge thereof, in the exercise of sound discretion may permit the defendant where judgment is deferred, to remain at large on his own recognizance, or may require him to enter into bond in a sum at least double the amount of the assessed fine and costs, conditioned that the defendant and sureties, jointly and severally, will pay such fine and costs unless the defendant personally appears on the day set in the order and discharges the judgment in the manner provided by Chapter 4, Title 9 of the Code of Criminal Procedure of the State of Texas; and for the enforcement of any judgment entered, all writs, processes and remedies of the Code of Criminal Procedure are made applicable so far as necessary to carry out the provisions of this Article."

It has been repeatedly held that in order to give the Court of Criminal Appeals jurisdiction on appeal of a misdemeanor case, the record must contain a final judgment. And failure to show a final judgment is fatal to an appeal. See 4 Texas Jurisprudence 171-172, § 122; *Owsley v. State*, 112 Tex. Cr. R. 641, 18 S. W. (2d) 178; *Sheffield v. State*, (Tex. Cr. App.) 57 S. W. (2d) 577; *White v. State*, 139 Tex. Cr. R. 415, 141 S. W. (2d) 339, and many others, as shown in Texas Digest, Criminal Law, Key number 1086 (13).

When the appellate jurisdiction of the Court of Criminal Appeals has once attached, it continues until the case, as made by the appeal, is completely executed by the court below, and it may issue all writs necessary to make its decrees effective. 4 Tex. Jur. 28, § 12, and cases cited.

When a misdemeanor case has been affirmed, the provisions of Articles 849, 850 and 851, Code of Criminal Procedure,

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control. The articles read as follows:

"Art. 849. When the judgment of the Court of Criminal Appeals is final, the clerk shall make out the proper certificate of the proceedings had and judgment rendered, and mail the same to the clerk of the proper court.

"Art. 850. When the mandate of the Court of Criminal Appeals is received by the proper clerk, he shall file it with the papers of the cause, and note it upon the docket.

"Art. 851. In misdemeanor cases where the judgment has been affirmed, no proceedings need be had after filing the mandate, except to forfeit the recognizance of the defendant, or to issue a capias for the defendant, or an execution against his property, to enforce the judgment of the court, as if no appeal had been taken."

We do not think the language of Article 698, supra, authorizing a deferred judgment was intended to apply to cases where appeal is perfected and affirmed by the Court of Criminal Appeals. We are of the opinion that the judgment may be deferred only by the trial judge, in the exercise of his discretion, and then the terms of the statute must be strictly followed.

Your question is answered in the negative.

We wish to thank you for the brief submitted in your letter requesting this opinion.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED NOV 24 1941

John S. Allen

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BY

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EW:RS

